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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL HARRIS,
Petitioner,

v.

RADIO-ELECTRONICS OFFICERS UNION, and
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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Rule 15.6 1

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Pursuant to Rule 15.6 of the Rules of this Court, petitioner Michael Harris hereby responds to the briefs in opposition of respondents Radio-Electronics Officers Union ("ROU")[1] and National Labor Relations Board ("NLRB")[2].

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[1] Brief in Opposition, hereinafter cited as "ROU Br".

[2] Brief for the National Labor Relations Board in Opposition, hereinafter cited as "NLRB Br".

ARGUMENT

The issue worthy of a writ of certiorari that Harris presents is whether the "closed shop" is, after all, illegal under the National Labor Relations Act ("NLRA")—or whether it can be perpetuated by the sleights of hand of draftsmen of collective-bargaining agreements. Specifically, the issue is whether, as applied to Harris in this case, the ROU's shipping rules violate NLRA §§ 8(a)(3), 8(b)(1)(a), and 8(b)(2)—because those rules (i) amount to an "illegal 'union-security' arrangement" (a "closed shop") through their explicit incorporation into the ROU's collective-bargaining agreements, or (ii) are "arbitrary" in their operation. The ROU and its new-found teammate, the NLRB, tip-toe around this issue with factual misstatements and legal errors.

I. The NLRB pretends that Harris "did not present his claim of a 'closed shop' in his petition for rehearing" in the Court of Appeals.[3] This is a two-fold misrepresentation.

A. Whether the shipping rules incorporated into the ROU's collective-bargaining agreements constitute a "union-security agreement" was manifestly an issue before the ALJ (who found that they did) and the NLRB and the Court of Appeals (who inexplicably held that they did not).[4] That no one used the very term "closed shop" *in haec verba* to describe the intended and unavoidable effect of the rules on Harris is irrelevant. The general term "union-security agreement"—which the ALJ, the NLRB, and the Court of Appeals repeatedly used—includes numerous specific arrangements, including the "closed shop".[5]

B. In the Court of Appeals, Harris denounced the shipping rules as "an unlawful union-security arrangement" that "requires applicants, such as Harris, to be in good standing **before referral**

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[3] NLRB Br at 9.

[4] *See* Petition for a Writ of Certiorari ("Petn") at 6, 7 & n.25, 9 & n.29.

[5] Petn at 12 & n.42.

takes place", contrary to the rule that " '[f]ull union membership no longer can be a requirement of employment' ".[6] This is a challenge to the "closed shop", by definition.

II. Realizing that Harris has exposed its game, the ROU dissembles, saying that "the ROU Shipping Rules * * * required that members *and non-members alike* must be in 'good standing,' meaning that members must have paid their dues and non-members must have paid their service fee".[7] "Alike" has nothing to do with it. The rules mandate that "[a] *member* must be *in good standing* to be placed on the National Shipping List."[8] This *pre*-hire condition is a classic "closed-shop" arrangement: the erstwhile "member" must be such (*i.e.*, "in good standing", a term typically used to mean *full, current, and paid-up institutional membership* in a union) *before* he can even apply for employment through placement on the shipping lists.[9]

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[6] Petition for Panel Reconsideration and Suggestion for Reconsideration *En Banc*, No. 92-1145 (D.C. Cir.), at 11-12 (**bold-face emphasis** supplied), *citing Pattern Makers' League v. NLRB*, 473 U.S. 95, 106 (1985).

[7] ROU Br at 2 (emphasis supplied).

[8] Petn at 2a, 24a (emphasis supplied).

[9] "Non-members must pay the current * * * fee" before they can be hired. Petn at 2a, 24a. This is a modified "closed shop", in which "membership" is whittled down to its financial core. *Cf. Communications Workers v. Beck*, 487 U.S. 735, 745 (1988). Thus, the ROU is inadvertently correct to refer to "members and non-members alike". For both members and nonmembers are subject to equally illegal (albeit substantively different) "closed-shop" arrangements—unless the "service fee" the ROU charged nonmembers did in fact represent its *pro rata* cost of administering the hiring hall.

The NLRB says that "[t]he record does not disclose the amount of [the 'service fee']", or that it "exceeded the pro-rata expense of operating the hiring hall". NLRB Br. at 10 n.3. However, the ROU admitted that "[m]embership dues for those not actively employed aboard ship and the quarterly service fee for non-members are equal". Brief in Support of Respondent's Exceptions, Case Nos. 15-CB-3488-2, 15-CB-3469-3, and 15-CB-3458 (NLRB, Region 15), submitted 15 June 1990, at 4. Moreover, the ROU's Labor Organization Annual Report Form LM-2 for 1988, the year Harris was denied referral, (on file with the Department of Labor and judicially noticeable) shows under the heading "Fees other than dues

III. Desperate to concoct an excuse for this Court not to consider the "closed-shop" issue so fatal to the ROU (and other unions of similar bent), the NLRB asserts that "there was no evidence of a union security agreement. * * * No party introduced any collective bargaining agreement into evidence or presented testimony on the subject".[10] This is obfuscation as deliberate and obvious as it is sorry.

A. In this Court, both the NLRB and the ROU *admit* that the ROU's shipping rules "are incorporated into the collective bargaining agreements" and "were part of [the ROU's] collective bargaining agreements".[11]

B. The opinions of the ALJ, the NLRB, and the Court of Appeals unanimously confirm these admissions.[12]

C. Even more compellingly, the ROU *judicially admitted* precisely this in its answer to the unfair-labor-practice charges:

> admits and alleges that ROU and various employer associations and employers * * * are parties to a Trust Agreement entitled the ROU Joint Employment Committee * * * . The trustees of the ROU Joint Employment Committee have designated the ROU to act as agent of the Joint Employment Committee in administering the Hiring Hall. *The Hiring Hall operates under shipping rules which are the result of Collective Bargaining Agreements*

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required from transfer members" the entry "N/A", and under the heading "Regular dues or fees or other periodic payments required to remain a member of the reporting labor organization (per year, mo., etc.)", shows "$300 per year". The demand on Harris for "second quarter dues" in advance was $75, exactly one-fourth of yearly dues, and not a lesser amount arguably representing only the pro-rata costs of operating the hiring hall.

[10] NLRB Br at 10 n.4.

[11] NLRB Br at 2; ROU Br at 2.

[12] *See* Petn at 2 & nn.6, 8; 20-21 & nn.69-71.

> *between ROU and various employer associations and employers. Such shipping rules are also incorporated into the By-laws of the ROU so that changes in the shipping rules require adoption of referenda by the members of the ROU as well as collective bargaining approval on behalf of various employer associations and employers and no such changes become effective until approved both by referenda and through collective bargaining.*[13]

Thus, the absence of redundant "evidence" and "testimony" is not surprising. No "evidence" or "testimony" was necessary after the ROU formally admitted that the shipping rules are "approved * * * through collective bargaining".

That the collective-bargaining agreements contain no clause explicitly entitled "union-security agreement" (the absence of which befuddled the NLRB and the Court of Appeals below)—or even labelled "illegal closed-shop scheme" (which the NLRB now suggests is necessary for the imposition of liability[14])—is beside the point. The record is pellucidly clear that: (i) the National Shipping List Rules are incorporated in the collective-bargaining agreements; and (ii) the rules denied Harris the opportunity to seek employment

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[13] Answer of Radio-Electronics Officers Union District 3, NMEBA, AFL-CIO ("ROU"), Case Nos. 15-CB-3458 & 15-CB-3469-3 (NLRB, Region 15), submitted 10 February 1989, Answer No. 3, at 1-2 (emphasis supplied). This Answer is "G[eneral] C[ounsel] Exh[ibit] 1(x)" in the NLRB's hearing record.

See also Brief in Support of Respondents' Exceptions, Case Nos. 15-CB-3488-2, 15-CB-3469-3, & 15-CB-3458 (NLRB, Region 15), submitted 15 June 1990, at 12 ("the record shows that ROU was enforcing a neutral hiring hall rule, which *is* part of ROU's collective bargaining agreements")(emphasis in the original); *and* Counsel for General Counsel's Answering Brief in Response to Respondent's Exceptions to the Decision of the Administrative Law Judge, Case Nos. 15-CB-3487, 15-CB-3488-1-2, 15-CB-3458, & 15-CB-3469-3 (NLRB, Region 15), submitted 19 July 1990, at 3-4 ("employers are party to collective-bargaining agreements with Respondent, which contain shipping rules which mandate that union members and non-member users of Respondent's exclusive hiring hall must be current in the payment of their dues and fees in order to * * * continue their registration on Respondent's shipping lists").

[14] *See* NLRB Br. at 10.

based solely upon his *pre*-employment lack of membership "in good standing" in the ROU. If this does not amount to a "closed shop", then nothing does.

Willfully blind to this obvious reality, the NLRB claims that Harris "cites no language in the Union's shipping rules requiring individuals to join the Union as a condition of obtaining or maintaining employment with employers covered by the agreement".[15] Amazing disgrace! Section 1 of the rules says that "[a] member must be in good standing to be placed on the National Shipping List".[16] Inasmuch as referral for employment depends upon prior placement on the list, this language "requir[es] individuals to join"—or maintain their membership in—the union (*i.e.*, "be in good standing") "as a condition of obtaining * * * employment". Section 1 goes on to say that a member "must remain so [*i.e.*, 'in good standing'] to continue his employment". This, plainly, is "a condition of * * * maintaining employment". That the NLRB refuses to admit as much shows how abjectly it has abjured its duties to protect Harris' rights, and how cavalierly it disregards its responsibilities of candor and fair argument to this Court.

Thus, as impotent as they are deceptive are the arguments of the ROU that "the correctness of a factual finding [as to whether there was a union-security agreement or not] hardly presents an issue worthy of this Court's consideration", and that "debate over the import of the contractual language is not worthy of the grant of certiorari".[17] No "*factual* finding" is in dispute, only a question of the legal effect that must be given to the *undisputed* operation of the shipping rules as applied here. The importance of this question to all employees subject to the NLRA is self-evident: For the Court of Appeals' error has licensed the ROU—and every other union

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[15] NLRB Br at 10-11 n.4.

[16] Petn at 2a.

[17] ROU Br at 5 n.8, 6.

running or desirous of running a "closed shop" through a hiring hall[18]—effectively to nullify NLRA §§ 8(a)(3) and 8(b)(2) by the simple device of not labelling a "closed-shop" scheme as the "union-security" arrangement it undeniably is. Apparently, in the longed-for world of the ROU and its new-found henchman the NLRB, with the Court of Appeals' acquiescence, a thorn by some other name becomes a rose!

IV. The once adversaries but now complicitors then join hands to assault Harris' claim that he was subject to a "closed shop" through the operation of the shipping rules.

A. The ROU complains that Harris "quotes no language which would require that every radio officer referred join the union—the *sine qua non* of a union security clause".[19] The complaint is groundless. *First*, the explicit language of the portion of Section 1 of the rules that deals with members requires that "every radio officer referred" *must* "join" (or maintain his membership in) the union ("be in good standing") before being placed on the shipping lists—which placement is the condition precedent to employment. Second, even were the "closed-shop" language of the rules ignored, as actually applied the rules operated to require Harris' membership "in good standing" as a precondition to referral for employment—the *sine qua non* of the "closed shop", whether enforced against one employee or one thousand.

B. The ROU also argues that "the hiring hall admittedly was open both to members and nonmembers alike".[20] In lockstep, the NLRB adds that Harris, "as well as any other member, had the

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[18] *See Breininger v. Local No. 6, Sheet Metal Workers*, 493 U.S. 67, 89 (1989): "An improperly functioning hiring hall thus resembles a closed shop, " 'with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union.' "

[19] ROU Br at 5 n.8.

[20] *Id.* at 5.

option of foreswearing union membership and using the hiring hall as a nonmember on the same basis as every other referent simply by paying the referral fee required to nonmembers. Accordingly, there is no basis for concluding that use of the referral system here was limited to union members in good standing".[21]

First, Harris never argued that "the referral system here was limited to union members in good standing", only that *he* was denied an opportunity for employment because he was not "in good standing" (*i.e.*, a union member) prior to hire. Harris submits that NLRA §§ 8(a)(3) and 8(b)(2) protect an *individual's* rights against "closed-shop" impositions: a *single* instance of denial of employment because of an individual's *pre*-hire failure to obtain or maintain membership "in good standing" is an unfair labor practice. Self-evidently, if the individual is not protected, groups of individuals are not protected either. The ROU and the NLRB, however, implicitly argue that the NLRA protects only some "collective" right: a "closed-shop" practice must be applied *universally* to all employees before any one employee may complain. But respondents proffer no authority for this proposition. And the law is to the contrary.[22]

Second, particularly obnoxious is the NLRB's notion that Harris has only himself to blame, because he could have become a nonmember and been referred for employment simply by paying the ROU's "service fee". The ROU had a duty not to impose "closed-shop" conditions *on Harris*, even if it treated every other radio officer properly, and under other circumstances would have treated Harris properly. In any event, there is no basis for claiming that the ROU imposed "closed-shop" arrangements against members but not against non-members. The "dues" and "fees" were the same for both.

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[21] NLRB Br at 9-10 (footnote omitted).

[22] *See Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 74-76 (1991) (not necessary to prove discrimination among employees to establish violation of the duty of fair representation).

V. Finally, the NLRB contends that "whether * * * it was necessary for the Union to give particularized notice to [Harris] of the consequences of his nonpayment of dues before removing him from the hiring hall referral list * * * does not merit this Court's review".[23] Whether a union should give particularized notice to employees where it collects "service fees" from them did merit this Court's plenary review in *Chicago Teachers Union, Local No. 1 v. Hudson*[24], however—a case in which the "consequences" to the affected employees was only the payment of small sums of money, not the loss of a major job-opportunity, as Harris suffered. If "particularized notice" in the labor-relations area should ever arouse judicial concern it is precisely and compellingly *where the absence of notice can doom the worker to unemployment*. Therefore, even more than in *Hudson*, review is warranted here; for the issue of "notice" is parallel, and the consequences of lack of notice to the affected employee far more severe.

CONCLUSION

Try as they may, the ROU and the NLRB cannot disguise the factual record in this case, or avoid the strictures of the law prohibiting the "closed shop". Moreover, that the ROU and the NLRB have suddenly found common ground from which to strike at Harris—and all other employees victimized by "closed-shop" schemes—should cause this Court grave concern over the NLRB's motives, and highlight the need for plenary review here.

Only those adept at political mindreading could fathom why the NLRB protests that this case involves no "closed shop" when it obviously does, and that the issue of "particularized notice" from the ROU does "not merit this Court's review",[25] even though the

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[23] NLRB Br at 7.

[24] 475 U.S. 292 (1986).

[25] NLRB Br at 7.

consequence of no notice was Harris' loss of employment.[26] But if a decision of a Court of Appeals effectively licensing unions to operate hiring halls as illegal "closed shops", coupled with the turncoat plea of the NLRB to look the other way, does not "merit this Court's review", then little could in the area of labor-relations law.

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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[26] Since its original decision in Harris' favor, the composition of a majority of the NLRB has changed; and the NLRB's General Counsel who prosecuted the case on behalf of Harris has been supplanted. As its brief shows, the "new" NLRB is ready to abandon an employee even where there is "substantial evidence"—and more than "substantial evidence"—in the record in his favor, and even though that abandonment requires the NLRB to jettison its long-held institutional position on the "substantial-evidence rule". *See* NLRB Br. at 8 (NLRB willing to accept Court of Appeals' contrary reading of factual record, notwithstanding rule of *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951)). That the "new" NLRB is ready to sacrifice its own institutional interests, as well as employees' rights, in order to perpetuate "closed-shop" schemes shows how disconnected the NLRB's position is from effectuating the true purposes of the NLRA.